No. 92-2058

In The

Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN and HATSUO HONMA,

Petitioners,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The Supreme Court For The State of Hawaii

OPENING BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. Section 151 *et seq.*

LIST OF PARTIES

All parties to the decisions below are contained in the caption of this case. Petitioner Hawaiian Airlines, Inc., a Hawaii corporation, is a wholly owned subsidiary of HAL, Inc., a publicly traded Hawaii corporation. HAL, Inc. is also the parent corporation of West Maui Airport, Inc.

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OPINIONS BELOW

The decision of the Supreme Court for the State of Hawaii in *Norris v. Finazzo, et al.* ("*Finazzo*"), Civil No. 89-2904-09, is reported at 74 Haw. 235, 842 P.2d 634 (Haw. 1992) (Pet. App. 1a).[1] The companion decision in *Norris v. Hawaiian Airlines, Inc.* ("*Hawaiian Airlines*"), Civil No. 87-3894-12, is not reported (Pet. App. 27a-29a). The orders of the Circuit Court of the First Circuit, State of Hawaii which were the subject of the appeal are not reported.

JURISDICTION

The judgments of the Hawaii Supreme Court were entered February 16, 1993 (Pet. App. 30a-38a). The petition for a writ of certiorari was filed on June 25, 1993, and was granted on January 21, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, clause 2 of the Constitution, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

Pertinent sections of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are reproduced at Pet. App. 42a-45a.

STATEMENT OF THE CASE

On February 2, 1987, Petitioner Hawaiian Airlines, Inc. ("Hawaiian Airlines") employed Grant T. Norris ("Norris") as an airline mechanic (Pet. App. 7a). The terms and conditions

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari; "Jt. App." refers to the Joint Appendix. Record cites to the record filed in the Hawaii Supreme Court in *Finazzo* and *Hawaiian Airlines* will be ("R." "Volume Number:" "page(s)").

of Norris' employment were governed by a collective bargaining agreement ("CBA") negotiated between Hawaiian Airlines and the International Association of Machinists and Aerospace Workers (AFL-CIO) ("IAM" or "the Union") pursuant to the provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (Pet. App. 46a-62a).

On July 15, 1987, Norris was involved in a dispute with his supervisor concerning a tire change on an Hawaiian Airlines' jet aircraft (Jt. App. 4). Norris expressed concerns regarding the airworthiness of the "axle sleeve" portion of the tire assembly, but an Hawaiian Airlines' inspector found the axle sleeve to be airworthy and directed that the tire change be completed (*Id.* at 5).

Norris was asked to sign a work record reflecting the tire change, pursuant to Article IV.D.4(a) of the CBA, which provides in relevant part: "An airline mechanic may be required to sign work records in connection with the work he performs." (Pet. App. 49a). Norris refused to sign the record, citing his concern regarding the safety of the axle sleeve, and claiming that he himself had not performed the work in question (Jt. App. 6). Norris' supervisor told Norris that the supervisor and the inspector had signed a work record regarding the condition of the axle sleeve and that Norris' signature for the tire change was not an endorsement of the condition of the sleeve (*Id.* at 82). Nevertheless, Norris would not change his position (*Id.* at 6). After Norris refused to sign the work record, he was held out of service pending an investigation into his conduct in accordance with the CBA (Jt. App. 6).

Articles XV and XVI of the CBA set forth detailed procedures for the adjustment of grievances and other employment disputes and establish an arbitral panel, a System Board of Adjustment ("System Board"), for final and binding resolution of claims through arbitration (Pet. App. 54a-55a). Article XVI.C of the CBA provides that the System Board "shall have exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company and between the Company and the Union, growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by [the CBA] . . . or out of the

interpretation or application of any terms of [the CBA]. . . ." (Pet. App. 55a).

The CBA grievance process regarding Norris commenced on July 15, 1987, when a step 1 grievance hearing was scheduled for July 31, 1987 (Jt. App. 214). The grievance proceeding focused on whether Norris' failure to sign the work record provided just cause for disciplinary action against him in light of the CBA's requirement that mechanics sign off for work performed (Jt. App. 214-15). Norris took the position that his refusal to complete the requested work record was justified by his questions about the safety of the axle sleeve (*Id.* at 213). Article XVII.F of the CBA provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law shall not warrant disciplinary action" (Pet. App. 60a).

Norris had an opportunity to present his argument at the step 1 grievance hearing on July 31, 1987 (Pet. App. 63a). Norris was present and represented at the hearing by his union representative (Pet. App. 63a; Jt. App. 212). On August 3, 1987, the hearing officer issued a step 1 report finding Norris' refusal to sign to be insubordination and recommending his termination (Pet. App. 63a). At some time between July 15 and August 3, 1987, Norris contacted the Federal Aviation Authority ("FAA") and reported that the axle sleeve he had observed was not airworthy (R. XVII: Deposition of Grant Norris, Vol. 4, Feb. 10, 1990, at 709-10). On August 4, 1987, after the step 1 determination had been made, the FAA contacted Hawaiian Airlines, inspected the axle sleeve and had it removed from the aircraft (Pet. App. 8a).

Pursuant to the CBA, Norris, through the IAM, filed an appeal to the step 3 grievance level regarding the step 1 determination (Jt. App. 208). Prior to the step 3 hearing, Hawaiian Airlines reduced Norris' discipline from a termination to a suspension without pay for the period from August 3, 1987 to September 15, 1987, and ordered him reinstated effective that latter date (Pet. App. 66a).

Norris did not return to work on September 15, 1987, and he took no further steps to pursue his grievance through the

System Board procedures mandated by the CBA (Pet. App. 9a). On December 8, 1987, Norris filed suit against Hawaiian Airlines in the First Circuit Court for the State of Hawaii (Jt. App. 3). In Count I, Norris alleged a common law tort claim that he was wrongfully terminated in violation of public policies embodied within the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* and the Federal Aviation Regulations, 14 C.F.R. § 21 *et seq.* (collectively "the Federal Aviation laws"), due to his refusal to complete work records regarding the tire change (Jt. App. 7). On September 20, 1989, Norris filed a second suit against three Hawaiian Airlines' managerial employees – Paul J. Finazzo, Howard E. Ogden and Hatsuo Honma ("the Individual Defendants") (Jt. App. 12).[2] In Counts I and II of the Complaint, Norris alleged common law tort claims that the Individual Defendants had ratified Hawaiian Airlines' wrongful termination of him in violation of the public policies embodied in the Federal Aviation laws (Count I), and in violation of the public policies embodied in the Hawaii Whistleblowers' Protection Act, H.R.S. § 378-61 *et seq.* (Count II) (Jt. App. 16, 17). The suit against the Individual Defendants was consolidated with the *Hawaiian Airlines* suit.

Upon motion by the Defendants, the state circuit court dismissed Count I of the suit against Hawaiian Airlines and Counts I and II of the suit against the Individual Defendants, finding those claims to be preempted by the RLA (Pet. App. 10a). On appeal, the Hawaii Supreme Court reversed the circuit court. In rejecting the RLA preemption defense, the Hawaii Supreme Court applied a preemption test derived from Section 301 ("Section 301") of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, as explicated in *Lingle v. Norge Div. of Magic Chef, Inc.* ("*Lingle*"), 486 U.S. 399 (1988), and *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 593 A.2d 750 (1991) (Pet. App. 16a-17a). The *Lingle* case held that Section 301 preempts only those

[2] On December 27, 1993, the circuit court granted Paul J. Finazzo's Motion for Summary Judgment and dismissed the claims against him.

state law claims in which "the application [of state law] requires the interpretation of a collective bargaining agreement." 486 U.S. at 407. In *Maher*, the New Jersey Supreme Court extended the holding of *Lingle* to govern RLA preemption. 593 A.2d at 758. The Hawaii court concluded that, under the *Lingle* standard, Norris' claims were not preempted since resolving those claims, in the court's view, would not require any interpretation of the CBA (Pet. App. 20a). The Hawaii court also concluded, relying on its understanding of this Court's holding in *Consolidated Rail v. Labor Executives' Ass'n.* ("*Conrail*"), 499 U.S. 299 (1989), that RLA adjustment board jurisdiction does not extend to "disputes arising outside a CBA" (Pet. App. 14a).

SUMMARY OF ARGUMENT

This case presents the question of whether Congress intended for the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to preempt state law claims for wrongful discharge for employees subject to the Act's mandatory dispute resolution provisions. Petitioners submit that, in enacting the RLA, Congress intended for RLA adjustment boards to resolve employment disputes concerning discipline and discharge that grow out of grievances generally or out of the application or interpretation of collective bargaining agreements in the rail and airline industries. The Hawaii Supreme Court's decision, which allows an employee to bypass RLA fora by asserting that a discharge is against "public policy" and does not require interpretation of a collective bargaining agreement, is inconsistent with the language, history and purposes of the RLA and must be reversed.

1. In Part I we show that the RLA by its plain language grants exclusive jurisdiction to RLA adjustment boards to resolve disputes growing out of grievances, including whistleblower discharge claims based on state law violations independent of a bargaining agreement. The legislative history of the RLA supports this construction and further establishes that submission of such disputes to adjustment boards is mandatory and subject to only very limited judicial review.

Congress sought in the RLA to promote stability and continuity of service in the rail and airline industries by establishing a system for uniform, expeditious, and final dispute resolution by adjustment boards composed of individuals knowledgeable in the complexities of those fundamental interstate industries. Those goals would be frustrated if carriers and employees were free – indeed required – to bypass the RLA procedures and attack one another in state courts of their choosing. Finally, the construction urged herein is supported by, and is a logical outgrowth of, this Court's decisions in *Elgin, J. & E. Ry. Co. v. Burley* ("*Burley*"), 325 U.S. 711 (1945), and *Andrews v. Louisville & Nashville Railroad Co.* ("*Andrews*"), 406 U.S. 320 (1972). Taken together, those cases recognize that the RLA preempts a state law "wrongful discharge" tort claim even where pled as an "independent" state law violation.

2. In Part II, we demonstrate that Norris' claims are exactly the kinds of disputes Congress intended to be preempted by the RLA. Those claims are common law tort actions for "wrongful discharge" related to safety and whistleblowing. The claims grow out of grievances or out of the interpretation or application of the CBA. Therefore, they are within the mandatory jurisdiction of the System Board pursuant to RLA Section 204 for all the reasons discussed in Part I of this brief.

In addition, the CBA here clarifies any ambiguity that might exist under the RLA as to the possibility that Norris' claims might be viable in state court. Section XVI.C of the CBA specifically grants "exclusive jurisdiction" to the System Board to determine employment disputes "growing out of grievances concerning disciplinary action" (Pet. App. 55a). Furthermore, Article XVII.F of the CBA would require the System Board to consider external law in reviewing Norris' "wrongful discharge" claims because that provision mandates that "[a]n employee's refusal to perform work which is in violation of . . . any local, state or federal health and safety law shall not warrant disciplinary action" (Pet. App. 60a-61a). Finally, Norris' claims involve disputes "growing out of . . . the interpretation or application" of the CBA under

Article XVI.C (Pet. App. 55a) because (1) the agreement must be interpreted to determine whether Norris was "discharged" and (2) Norris' discipline grew out of an application of Article IV.D.4(a) of the CBA, which provides that "[a]n aircraft mechanic may be required to sign work records in connection with the work he performed" (Pet. App. 49a).

Given the breadth of System Board jurisdiction under the CBA's terms and the federal statutory authorization under the RLA for that contractual jurisdiction, Norris was required to present those claims to the System Board. This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), supports Petitioners' view that arbitration agreements entered into within the scope of federal statutory authorization can properly require arbitration of non-contract-based employment claims. Indeed, the subject matter of Norris' claims – an alleged discharge for raising safety concerns and whistleblowing – is one that is frequently dealt with in arbitration.

3. In Part III, we primarily address the issues of whether the preemption standard for LMRA Section 301 under *Lingle*, 486 U.S. 399 (1988), should be applied to determine RLA preemption and whether the test developed in *Conrail*, 491 U.S. 299 (1989), for distinguishing "major" and "minor" disputes under the RLA should be determinative of the scope of RLA preemption.

The *Lingle* preemption test turns on whether a collective bargaining agreement must be interpreted to resolve a state claim. That test was developed to meet the Congressional objectives underlying LMRA Section 301 – namely, assuring uniform federal common law interpretation of collective bargaining agreements. Section 301 by its terms simply provides for federal court jurisdiction over claims alleging breach of a bargaining agreement. Congress had much broader purposes in mind in the RLA in mandating arbitration by industry adjustment boards of a broad range of disputes, including non-contract-based disputes. Indeed, RLA Section 204 by plain language commits to adjustment boards in the airline industry jurisdiction over disputes growing out of grievances or out of contract application in addition to disputes growing

out of contract interpretation. To apply *Lingle*'s narrow preemption test to RLA preemption would deprive adjustment boards of mandatory jurisdiction over a broad range of disputes which Congress plainly intended the boards to resolve.

In *Conrail*, this Court was presented with a dispute clearly within the jurisdiction of the RLA dispute resolution mechanisms and was required to determine whether the dispute had to be resolved through the negotiation and mediation procedures for "major" disputes or the adjustment board procedures for "minor" disputes. The Court did not address RLA preemption and certainly did not overrule the "omitted case" holding of *Burley*, 324 U.S. 711 (1945), which contemplates adjustment board jurisdiction over non-contract-based disputes such as those presented by Norris' claims. Indeed, *Conrail* quotes the "omitted case" holding of *Burley* with approval. *Conrail* is therefore entirely consistent with the position advanced by Petitioners in Part I, and the facts related to Norris' claims show that those claims are classic examples of "minor" disputes committed to adjustment board jurisdiction.

ARGUMENT

I. STATE LAW "WRONGFUL DISCHARGE" CLAIMS ARE PREEMPTED BY THE RLA.

Article VI of the Constitution of the United States, in commanding that "the Laws of the United States . . . shall be the supreme Law of the Land," gives Congress the power to preempt state actions in areas in which it has the power to legislate. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 5 (1824). The preemptive scope of a federal law is determined by an inquiry in which "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Congressional intent to exercise preemptive power may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Even in the absence of specific preemptive language, state action is

preempted where " 'it conflicts with federal law or would frustrate the federal scheme,' " or where " 'the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Norris must concede, as the Hawaii Supreme Court in the decision below acknowledged, that Congress intended the RLA to preempt some state law "wrongful discharge" claims brought by rail or airline industry employees against their employers (Pet. App. 13a & n. 10). However, erroneously relying on this Court's *Lingle* decision, Norris and the Hawaii court claim that the RLA does not preempt state law wrongful discharge tort actions that do not require interpretation of a collective bargaining agreement (Pet. App. 16a-17a). As explained below, reliance on *Lingle*, an LMRA case, is unfounded in the context of the RLA. The plain language and legislative history of the RLA demonstrate that Congress intended for RLA adjustment boards to resolve employment disputes growing out of the discipline or discharge of an employee, including disputes based on alleged violations of state laws independent of a bargaining agreement.

A. CONGRESS INTENDED FOR DISCHARGE AND DISCIPLINE DISPUTES IN THE RAIL AND AIRLINE INDUSTRIES TO BE RESOLVED THROUGH THE RLA'S PROCEDURES.

1. The Statutory Scheme Contemplates Adjustment Board Resolution of "Wrongful Discharge" Claims.

a) The RLA's Plain Language Encompasses Disputes Outside of the Bargaining Agreement.

By plain language which has remained unchanged since the RLA's enactment in 1926, Congress made clear that RLA adjustment board procedures should be used to resolve

employment disputes beyond those where a breach of a collective bargaining agreement is claimed. The RLA's statement of general purposes includes the following broad description of the disputes Congress intended to be settled through RLA procedures:

> The purposes of the chapter are: . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of **all disputes growing out of grievances or out of the interpretation or application of agreements** covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a (4)-(5) (emphasis added).

That Congress expected non-contract-based employment disputes to be resolved through the RLA's processes is also demonstrated by the plain language of Section 2 First of the RLA, which describes the general duties of the parties under the Act:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to **settle all disputes, whether arising out of the application of such agreements or otherwise**, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First (emphasis added).

Congress used similarly broad language to describe the scope of disputes committed to rail industry adjustment boards: in Section 3 First (i) and Section 3 Second of the RLA, 45 U.S.C. §§ 153 First (i) and 153 Second, adjustment boards are identified as the mandatory fora for resolution of "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of

the interpretation or application of agreements. . . . "[3] RLA Section 3 First (i), 45 U.S.C. § 153 First (i). Such claims are referable to the National Railroad Adjustment Board ("NRAB"), a permanent industry-wide adjustment board created under RLA Section 3 First, or to alternative adjustment boards established under RLA Section 3 Second. The adjustment board must render a final decision binding on all parties to the dispute, and that decision is subject to only limited judicial review. RLA Section 3 First (p) and (q), 45 U.S.C. § 153 First (p) and (q).

When Congress applied the RLA to the airline industry in 1936, it used similarly broad language to describe the scope of disputes to be resolved, the duties of the parties, and the methods for dispute resolution. *See* RLA Sections 201-205, 45 U.S.C. §§ 181-185. Adjustment Boards with jurisdiction and duties virtually identical to those of the NRAB are empowered to resolve "[t]he disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . . " RLA Section 204, 45 U.S.C. § 184. *Accord* RLA Section 205, 45 U.S.C. § 185.

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[3] RLA Section 4, 45 U.S.C. § 154 establishes the National Mediation Board ("NMB") as a mediating body in the rail and airline industries, and RLA Section 5 First and 203, 45 U.S.C. §§ 155 First and 183, grant the NMB jurisdiction to deal with "dispute[s] concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference [and] any other dispute not referable to [adjustment boards] and not adjusted in conference between the parties, or where conferences are refused." *Id.* Those kinds of disputes, termed "major" disputes, are not at issue in the *Norris* case. Instead, the question presented here is whether Norris' wrongful discharge claims present a dispute "growing out of grievances or out of the interpretation or application of agreements" falling within the scope of Section 204 of the RLA, 45 U.S.C. § 184.

b) Congress Expressly Committed "Whistleblower" Claims to RLA Jurisdiction.

One provision of the RLA, Section 204, makes it crystal clear that Congress intended for adjustment boards in the airline industry to resolve discharge and discipline claims even if those claims are based on non-contractual, public policy grounds: in Section 204, Congress explicitly included within the set of disputes covered by the RLA's dispute resolution procedures "cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board." 45 U.S.C. § 184. The National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), had been passed by Congress on July 5, 1935, and contained a specific provision – Section 8(4) – making it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA]." See 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3270, 3273-74 (1935). Section 8(4) was recodified without change as Section 8(a)(4), 29 U.S.C. Section 158(a)(4), in 1947. See 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 6, 178, 237-239 (1948). NLRA Section 8(4) was an early example of a "whistleblower" protection statute,[4] and Congress therefore determined by the passage of Section 204 of the RLA that the resolution of any pending claim by an NLRA whistleblower would be decided exclusively through RLA dispute resolution procedures.

A "whistleblower" statute contained in the Federal Rail Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, also strongly supports the Petitioners' view that Congress intended

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[4] Section 8(3) of the NLRA also protected employees against retaliation and discrimination based on participation in other protected activities, such as union involvement. See 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3270, 3273-74 (1935). The legislative history of RLA Section 204 contains specific examples of statutory discharge claims that were being transferred to the RLA's dispute resolution procedures. *See infra* p. 18.

for the RLA adjustment board procedures to be followed in resolving claims such as those raised by Norris. Section 212 of the FRSA contains a whistleblower protection provision which prevents a common carrier from "discharg[ing] or in any manner discriminat[ing] against any employee" for filing a complaint or instituting a proceeding related to enforcement of the FRSA. *See* 45 U.S.C. § 441. Congress explicitly committed the enforcement of Section 212 to the adjustment board procedures under the RLA. *See* 45 U.S.C. §§ 441(c), 153. The NRAB is given full authority to resolve those disputes and to impose appropriate remedies, including punitive damages.[5]

Significantly, Congress made it clear that in enacting the FRSA whistleblower provision, it was merely preserving the protections and remedies already available under the RLA. The Committee Report states that the intent was simply to codify the existing system:

> The Committee understands that rail employees already receive similar protection, along with back-pay, through the grievance procedure. The Committee does not intend to alter the existing protection, but rather to put the prohibition of discrimination into statutory form. . . . Subsection (c)(1) provides that any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures in Section 3 of the Railway Labor Act. The Committee intends this to be the exclusive means for enforcing this section.

H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980). Thus, Congress clearly recognized that the existing adjustment

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[5] The record before the Hawaii Supreme Court, and before this Court, contains deposition testimony by an arbitrator with 25 years of experience arbitrating claims in the airline industry describing (1) the full *status quo ante* remedies that would have been available to Norris if he had prevailed before the system board of adjustment and (2) the possible availability of punitive damages and a cease and desist order (Jt. App. 305-319). *See also IAM v. Northwest Airlines*, 858 F.2d 427, 432 n.4 (8th Cir. 1988) ("penalty awards are generally enforceable under the Railway Labor Act").

board procedures under the RLA provide relief for claims of whistleblower discipline or discharge.[6]

In sum, the language of the RLA makes clear Congress' intent to extend RLA jurisdiction beyond disputes over the interpretation or application of bargaining agreements to reach non-contractual claims, including common law tort "wrongful discharge" claims based on "whistleblowing."[7] The RLA stands alone among employment statutes in the breadth of its reliance on non-judicial dispute resolution procedures to resolve exactly the kind of "wrongful discharge" claims presented by Norris to the Hawaii court.[8]

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[6] *See United Transp. Union v. Springfield Terminal Co.*, 767 F. Supp. 333 (D. Me. 1991) (whistleblower provision codified existing dispute resolution mechanisms of the RLA). Furthermore, the FRSA's whistleblower provision has been held to preempt state wrongful discharge claims identical to those raised by Norris. *See Rayner v. Smirl*, 873 F.2d 60 (4th Cir.) (Section 441 and the "comprehensive remedial provisions" of the RLA incorporated therein are the railroad employee's exclusive remedy, and therefore state law claims for wrongful discharge are preempted), *cert. denied*, 493 U.S. 876 (1989). Although the *Rayner* court relied in part on the explicit preemption provision of the FRSA, *see* 45 U.S.C. § 434, the court's decision rested heavily on the fact that the state wrongful discharge statute was incompatible with the "detailed remedial scheme" of § 153 of the RLA. *Rayner v. Smirl*, 873 F.2d at 66.

[7] In contrast, LMRA Section 301, the provision upon which *Lingle* preemption is based, is limited to claims "for violation of contracts." 29 U.S.C. § 185(a).

[8] As this Court has recognized, the dispute resolution framework set forth in the RLA is "the product of a long legislative evolution" which "has no statutory parallel in other industry." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 754 (1961). For an overview of the unique early history of congressional involvement in rail labor disputes, see *id.* at 356 nn. 11-12 (discussing legislation from 1888 to 1920).

2. The Legislative History Underlying the RLA Likewise Demonstrates Congress' Intent For Claims of "Wrongful Discharge" to Be Resolved By RLA Procedures.

The legislative history of the RLA from the time of its inception confirms that Congress intended for RLA adjustment boards to resolve claims arising from rights or obligations outside the terms of a collective bargaining agreement. In the 1926 floor debates leading to the enactment of the RLA, Senator Watson described the types of matters committed to adjustment boards:

> there are two classes of disputes that arise in connection with the operation of railroads. One class is what are ordinarily called grievances. They may be of a personal nature; they may involve a great many employees; they may involve a few employees; they may involve but one employee. Of this class, also, are disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions.

67 Cong. Rec. 8807 (1926) (statement of Sen. Watson). Senator Watson's statement clearly signals Congress' understanding that the term "grievances" as used in Section 3 First (i) of the RLA, and later carried over to Section 204, was intended to apply broadly to non-contract based "personal" claims of employees.

Claims related to discipline were also identified in the legislative history of the RLA as intended to fall within adjustment board jurisdiction, even if those claims did not involve interpretation or application of bargaining agreements. Thus, in 1926 Representative Barkley described the function of the adjustment board as "not to consider questions of wages, but disagreements over grievances, interpretations, discipline and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." 67 Cong. Rec. 4517 (1926). *See also* 67 Cong. Rec. 4670 (1926) (statement of Rep. Arentz) ("Minor disputes

involve discipline, grievances and disputes over the application and meaning of an agreement").[9]

In the 1926 House Debates, Representative Crosser similarly described the scope of inquiry to be conducted by RLA fora in most expansive terms: "These boards serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees." 67 Cong. Rec. 4665 (1926).

The history of the RLA after its enactment in 1926 likewise makes clear that Congress intended for RLA adjustment boards to resolve non-contractual claims involving discipline and discharge. Following enactment of the RLA, the newly created NRAB did address claims relating to discipline and discharge. *See* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937). While there were many difficulties with the enforcement procedure of the 1926 Act – and those difficulties led to amendments in 1934 and later – the scope of claims regarding discipline and discharge committed to the adjustment board process was apparently unobjectionable because the scope of disputes covered by RLA Section 3 First (i) adjustment board procedures has remained unchanged for almost seventy years.

The RLA was amended in several important respects in 1934 in order to render its adjustment board procedures more effective.[10] Those amendments continued to reflect Congress' clear and strong commitment to a broad RLA dispute resolution process. The participants in the debates that led to the 1934 amendments understood that adjustment board jurisdiction was quite broad, but they – and Congress – chose to leave

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[9] An early and respected authority on the Railway Labor Act similarly expressed his view that "questions of discipline or refusal to promote (constituting 'grievances') are reviewable by the board. . . . " Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937).

[10] This Court has addressed the 1934 amendments and their history at length in numerous decisions. *See, e.g., Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957); *Burley*, 325 U.S. 711 (1945).

that broad jurisdiction unchanged. This Court has concluded from comments by organized labor during the debates on the 1934 amendments that "[t]he employees were willing to give up their remedies outside of the statute" in order to achieve final binding adjustment of grievances through an adjustment board. *Union Pac. R.R. v. Price*, 360 U.S. 601, 613 (1959). Those unions supporting the amendments understood that their members were making an important but worthwhile concession:

> These railway labor organizations have always opposed compulsory determination of their controversies. . . . [W]e are now ready to concede that we can risk having our grievances go to a board and get them determined and that it is a contribution that these organizations are willing to make.

Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2d Sess. 33, 35 (1934).

Those labor organizations that opposed the amendments similarly understood that the amendments would require "compulsory arbitration," and they claimed the enactment of the amendments would establish a dangerous precedent which would be unique in the history of the United States Congress. *Hearings before the House Committee on Interstate and Foreign Commerce on HR 7650*, 73rd Cong., 2d Sess. 118 (1934). Nevertheless, the amendments were passed, and no mention was made during the debates or hearings leading up to the amendments of any state law claims that would survive the 1934 amendments' enactment.

Another facet of the 1934 amendments demonstrating Congress' broad commitment to adjustment boards is the extraordinarily limited judicial review of adjustment board proceedings provided by the amendments. The scope of review provided in Section 3 First (p) and (q), 45 U.S.C. § 153 First (p) and (q), is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (citations omitted). "Not only has the Congress thus designated an agency peculiarly competent to handle" workplace

disputes, "it also intended to leave a minimum of responsibility to the courts." *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566 (1946).

The legislative history underlying the 1936 amendments to the RLA extending the RLA's dispute resolution procedures to air carriers also demonstrates that non-contract based, public policy discharge cases were specifically included among the types of cases Congress was told would be transferred from the NLRA setting to the RLA dispute resolution procedures. For example, Captain E.G. Hamilton of the Air Line Pilots Association identified a wrongful discharge case by pilots who had been terminated for attempting to bargain collectively and a case alleging discrimination against a pilot as examples of cases that would be decided by RLA procedures. *To Amend the Railway Labor Act to Cover Every Common Carrier by Air Engaged in Interstate Commerce, Hearings on S. 2496 Before a Subcommittee of the Committee on Interstate Commerce*, 74th Cong., 1st Sess. 5 (1935). Similar views were expressed by a representative of the International Association of Machinists which represented many airline mechanics: "numerous complaints for the men of discrimination, [were] brought . . . before the regional labor boards, which are subsidiary to the National Labor Relations Board, and in some cases we got them adjusted and in others we did not." *Id.* at 20 (statement of D. Kaplan, Research Director, International Association of Machinists).

Finally, Congress' decision in 1936 to require adjustment boards to begin resolving employment disputes in the airline industry *before* collective bargaining agreements had been reached strongly supports Petitioners' contention that Congress intended for the RLA to reach beyond contract disputes. Thus, the 1936 amendments provided for creation of system boards of adjustment "to settle individual disputes" even though Congress recognized that "there are no such [airline collective bargaining agreements] in operation now." H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936). Given the foregoing legislative history, it is clear that Congress intended for adjustment boards to have mandatory jurisdiction to

resolve wrongful discharge claims even if those claims arose outside the terms of a collective bargaining agreement.

3. Allowing Norris to Bypass the RLA Dispute Resolution Process and Challenge His Discipline in State Court Would Frustrate the RLA Scheme.

"The purpose of the Railway Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees. . . . " *Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959). As this Court has recognized, the RLA is "a product of many years of thought, study, conferences, discussions and experiments." *Pennsylvania R.R. v. Day* ("*Day*"), 360 U.S. 548, 555 (1959). Based on that long experience, Congress concluded that industrial peace in the vital transportation industry would be fostered by a dispute resolution system built on the principles of uniform application of rules and cooperative and autonomous decision making by individuals knowledgeable in the complexities of the rail and airline industries. Permitting state claims for wrongful discharge would clearly frustrate the goals which Congress sought to achieve through the RLA's enactment.

Congress recognized during consideration of the 1934 amendments that uniformity in dispute resolution was important in part because consistent application of rules relating to grievances would lessen the frequency of disputes and unrest. *See Hearings before the Senate Committee on Interstate Commerce on S. 3266*, 73rd Cong., 2d Sess. 17 (April 10, 1934) (statement of Commissioner Eastman, principal draftsperson of the 1934 amendments) ("if some greater degree of uniformity can be attained by national consideration, the tendency will gradually be to reduce the number of debatable disputes. Precedents will mean something, whereas they now often mean little or nothing"). In addition, disparity of treatment among similarly situated workers was a leading cause of unhappiness among employees. *Day*, 360 U.S. at 553; *see also International Ass'n of Machinists v. Central Airlines, Inc.* ("*Central Airlines*"), 372 U.S. 682, 691-92 (1963) (RLA

cannot be construed to permit inconsistent decisions by state tribunals: "The needs of the subject matter manifestly call for uniformity").[11]

As this Court has recognized, the RLA's goal of uniformity would be undermined if state courts were permitted to encroach on the adjustment board's authority:

> We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized, technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings but diversity through judicial construction and through the construction of the adjustment board. Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through

[11] Congress has recognized that there is a more compelling need for uniformity of treatment for transportation industry employees than exists in other industries: "Railroads and airlines are direct instrumentalities of interstate commerce . . . the duties of many employees require the constant crossing of State lines; many seniority districts under labor agreements. . . extend across State lines, and . . . employees are frequently required to move from one State to another." H.R. Rep. 2811, 81st Cong., 2d Sess. 5 (1950) (amendments adding union security agreements to RLA and rejecting language whereby an employee could "opt out" of unionization under state right to work laws). *See also* 96 Cong. Rec. 16,261 (1950) (statement of Sen. Hill) ("When we pick up a telephone in Washington to make a call to Florida it does not involve any personnel moving out of the District of Columbia and going to Florida or to any other State. . . . However, when a railroad train moves out of Washington on the way to Florida, personnel does cross State lines.").

> the Adjustment Board would hamper, if not defeat, the central purpose of Railway Labor Act.

Day, 360 U.S. at 553. This Court has similarly recognized that when the RLA was extended to air carriers in 1936 Congress " 'could not . . . have thought that stability and continuity to interstate air commerce would come from the undulating policies . . . of the legislatures and courts (or both) of the [50] states.' " *Central Airlines*, 372 U.S. at 691 n.15 (citations omitted).

Forum shopping is antithetical to the goal of promoting uniformity in dispute resolution in the transportation industry. If claims such as Norris' were permitted to go forward in the multitude of available state courts, a climate of discord and dispute could be expected as employees or carriers disappointed with a given ruling by an adjustment board ignored that ruling and went to another tribunal looking for a more favorable result.[12] As a crazy-quilt of state decisions fell into place, workers throughout the industry would undoubtedly feel the stab of disparate treatment, the very result Congress sought to avoid by mandating adjustment board resolution of claims.

[12] It is important to recognize that the Hawaii court's decision would probably do more than simply provide an employee with an election of fora for wrongful discharge or other non-contractual grievances. It could lead employees to commence RLA procedures and then resort to state actions if disappointed with the RLA's result. *See Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993). It could also encourage an employee who has prevailed before the RLA to pursue an action in state court to recover damages not available through RLA procedures. *E.g., Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250 (5th Cir. 1986) (discharged employee recovered back pay through RLA grievance procedures then filed state court suit to recover for emotional distress as a result of his firing), *cert. denied*, 488 U.S. 925 (1988). Finally, a litigant frustrated with the law in, or result obtained from, one state tribunal might file a new action in another state with sufficient contacts to the employment relationship where substantive laws were more hospitable to his claim and also distinct enough to avoid the preclusive effect of an adverse judgment in the first state forum.

Another means by which Congress intended to foster harmony within the transportation industry was through the significant industry autonomy placed in the RLA's dispute resolution procedures. In a departure from its prior legislation in the area,[13] Congress took the approach that reposing decisionmaking authority with those likely to be affected by the decisions would foster peace within the industry and promote conciliation of disputes:

> The provisions of this measure will add to the efficiency of the transportation system by affording a sane and practical method for the settlement of disputes between the operators and the employees. By providing in this manner for a better understanding between those concerned and for an effective settlement of points of dispute increased efficiency will follow in the transportation service.

67 Cong. Rec. 4666 (1926) (statement of Rep. N. C. Laughlin). It was similarly observed in the House of Representatives that "the more responsibility and power you throw at the employer and the employees the more likely you are to get peace. . . . " 67 Cong. Rec. 4650 (1926) (statement of Rep. Jacobstein).

Congress also viewed autonomy as an important objective because of the particular competence of adjustment boards to decide disputes within the affected industries. It has been observed that the rail industry is "a state within a state" with its own laws and particular customs. Congress concluded that "disputes should be settled by practical men of affairs in close contact with the situation and with an understanding of

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[13] Prior to enactment of the RLA, the Transportation Act of 1920 provided for mandatory resolution of rail industry disputes by a federally-created Rail Labor Board. As this Court has recognized: "The experiment was unsuccessful." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 756 (1961). "Congress has since that time consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship." *Id.* at 757.

the psychology of the parties." 67 Cong. Rec. 4650 (1926) (statement of Rep. Jacobstein).

Allowing Norris to bring his wrongful discharge claims in state court would undermine the goal of uniform, autonomous, knowledgeable, expeditious, and final decisionmaking embodied in the RLA. The facts surrounding Norris' censure raise myriad issues calling for knowledge of, expertise in, and sensitivity to airline industry concerns.[14] Affirmance of the Hawaii court's decision would therefore undermine Congress' goals in enacting the RLA and prevent dispute resolution by the decisionmaker – the system board of adjustment – that Congress chose to resolve discharge and discipline disputes.[15]

B. THE SUPREME COURT'S INTERPRETATION OF THE RLA SCHEME SUPPORTS PREEMPTION OF STATE "WRONGFUL DISCHARGE" CLAIMS.

1. This Court Has Recognized That Adjustment Board Jurisdiction Extends to Disputes That Arise Outside the Terms of a Collective Bargaining Agreement.

In *Elgin, J. & E. Ry. Co. v. Burley* ("*Burley*"), 325 U.S. 711 (1945), this Court conducted an extensive review of the language and legislative history of the RLA and found that

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[14] For example, one issue demanding adjustment board input is determining whether the actions taken against Norris after he refused to sign the work record amounted to a "discharge." *See infra* pp. 34-35.

[15] Since the Hawaii court held Norris' wrongful discharge claim was not a "minor" dispute, the court's holding could result in removing similar claims from adjustment board jurisdiction even for those employees desiring to resolve their wrongful discharge disputes in that forum. The Hawaii court's decision may also preclude workers covered by Norris' CBA from claiming that the express provisions of Art. XVII.F of the CBA protect them from being discharged for refusing to perform work in violation of federal or state safety laws other than workplace safety laws (*See* Pet. App. 60a).

the statutory provisions for adjustment of disputes encompassed disputes over rights and interests existing independent of a collective bargaining agreement. The *Burley* Court recognized that Congress intended for RLA adjustment board jurisdiction to extend not only to contract interpretation or application issues but also to the so-called "omitted case" where "the claim is founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective bargaining agreement, *e.g.*, claims on account of personal injuries." 325 U.S. at 723. As shown below, that conclusion was essential to the Court's holding in *Burley* and has not been overturned by later decisions.

Burley addressed the question of whether and to what extent an aggrieved employee had a right to participate in the prosecution and settlement of disputes before an adjustment board under Section 3 of the RLA. The carrier there had settled a number of individual employee grievances by agreement with the employees' bargaining representative but had not obtained the consent of involved employees to some of the settlements. The carrier argued that the bargaining representative had the power to settle the grievances on the employees' behalf. 325 U.S. at 733. The Court rejected that view:

> We think that such a view of the statute's effects, insofar as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy.

325 U.S. at 733.[16]

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[16] The RLA as interpreted in *Burley* is thus clearly distinguishable from the LMRA, under which an employee has no independent right to go to arbitration. *Republic Steel Corp. v. Maddox* ("*Maddox*"), 379 U.S. 650, 653 (1965) (for arbitration of contract grievances under LMRA § 301, "unless the contract provides otherwise there can be no doubt that the employee must afford the union the opportunity to act on his behalf"). Under the LMRA the employee's recourse if the union refuses to process his grievance is to sue the union for breaching its duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171 (1967). The RLA grievant, by contrast, is free to pursue his or her own grievance as an individual through the adjustment board.

The Court held that "[a]cceptance of this view would require the clearest expression of purpose" since exclusive union representation would work a severe hardship on aggrieved employees. *Id.* The construction urged by the carrier was viewed as severe precisely because of the extensive reach of RLA jurisdiction:

> It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them *and to all other incidents of that relation*. . . . [T]his would mean that Congress had nullified *all preexisting rights of workers to act in relation to their employment*. . . .

325 U.S. at 733-34 (emphasis added).

The Court also recognized that exclusive union representation would not in all instances guarantee adequate prosecution of claims on behalf of the individual employee. The union was likely to be less than zealous in prosecuting disputes "where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all. . . . " 325 U.S. at 734.[17]

> That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final

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[17] Cf. *Maddox*, 379 U.S. at 653: "Union interest in prosecuting employee grievances [in the LMRA setting] is clear." The different approaches under the RLA and LMRA are attributable in large part to the fact that RLA jurisdiction extends beyond contract disputes, while LMRA jurisdiction does not.

> and exclusive power of settlement in the collective agent.

325 U.S. at 734.

Even though the claims of the aggrieved employees in *Burley* involved the collective bargaining agreement, the Court's finding that non-contractual claims fell within the adjustment board jurisdiction was clearly an integral part of the *Burley* decision. While the question presented in the instant case is different, the *Burley* Court's careful and deliberate finding should be deemed controlling on the question of the reach of RLA jurisdiction.

The Hawaii Supreme Court in the decision below found implicitly that the so-called "omitted case" finding of *Burley* was overruled by this Court's recent decision in *Consolidated Rail v. Labor Executives' Ass'n ("Conrail")*, 491 U.S. 299 (1989):

> The Court stated that "minor" disputes, to which § 153 First (i) applies, are those that "may be conclusively resolved by interpreting the existing [collective bargaining] agreement." 491 U.S. at 305 (citations omitted). The Court also stated that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307. *The Supreme Court's interpretation of the RLA's mandatory arbitration provision demonstrates its belief that Congress intended to affect only those disputes involving contractually defined rights.*

(Pet. App. 14a) (emphasis added).

Petitioners respectfully submit that the Hawaii court's conclusion that *Conrail* somehow overruled *Burley's* "omitted case" holding is erroneous. The question presented in *Conrail* – whether a carrier's asserted right to conduct drug testing of employees should be resolved through NMB mediation procedures under RLA Section 5 or adjustment board arbitration under RLA Section 3 First (i) – had nothing whatsoever to do

with determining which disputes fell outside RLA dispute resolution procedures. The *Conrail* Court described the "major/minor terminology" as "a shorthand method of describing two classes of controversy Congress had distinguished in the RLA." 491 U.S. at 302. Nowhere does the *Conrail* Court describe its discussion of the major and minor categories as exhaustive of RLA jurisdiction. There was no reason for the *Conrail* Court to reach *Burley*, since the earlier holding was not determinative of the issues before it. Therefore, there is no reason to believe the *Conrail* Court intended to disturb the earlier finding in *Burley* that the RLA dispute resolution procedures extend to non-contractual claims. In fact, there is much in the Court's decision in *Conrail* suggesting that the "omitted case" remains an accepted category of RLA jurisdiction to be committed to adjustment board procedures, as *Conrail* quotes *Burley's* "omitted case" discussion, 491 U.S. at 303,[18] with apparent approval.

2. *Andrews* Declares That the RLA Adjustment Board Is the Exclusive Forum for "Wrongful Discharge" Claims.

Andrews v. Louisville & Nashville R.R. ("*Andrews*"), 406 U.S. 320 (1972), holds that an employee may not avail himself of a state law forum and remedy to challenge an alleged wrongful termination. *Andrews* finally and definitively overruled a line of cases which had held that a terminated employee could elect to assert a claim of wrongful discharge in state court: *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941); *Transcontinental & W. Air, Inc. v. Koppal*, 345 U.S. 653 (1953). The reach of *Moore* and *Koppal* had been eroded over the years, as decision after decision construing the RLA endeavored to distinguish or limit their holdings. *See, e.g., Burley*, 325 U.S. at 720-21. In *Andrews* the Court finally plainly acknowledged that "the notion that the grievance and

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[18] The Hawaii court quotes from *Conrail's* quotation of *Burley*, but significantly the Hawaii court's quotation omits the portion of the *Conrail* quote describing the "omitted case" rule (Pet. App. 12a).

arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." 406 U.S. at 322.

In rejecting the reasoning of *Moore* and *Koppal* that RLA dispute resolution procedures were merely voluntary, the *Andrews* court observed,

> Later cases from this Court have repudiated the reasoning advanced. . . . Fifteen years ago, in *Brotherhood of Railroad Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 39 (1957), this Court canvassed the relevant legislative history and said:
>
> > "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

406 U.S. at 322. The Court also cited its observation in *Walker v. Southern R.R.*, 385 U.S. 196, 198 (1966): " 'Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes. . . . ' " 406 U.S. at 322 (quoting *Walker*).

Andrews goes quite far toward resolving the issues before the Court on the instant petition. In *Andrews* the employee similarly claimed his discharge was "wrongful" and in violation of state law. The employee had pled his claim as a breach of contract under state law and had refused to go through the adjustment board procedures. In holding the claim preempted in spite of its characterization as a breach of state law, the Court made clear that a discharged employee cannot avoid the strictures of the RLA through artful pleading. Under similar facts in *Moore*, the employee was held entitled to pursue a state law claim because he "chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee. . . . " *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239 (1950). *Andrews* flatly rejected that approach: "The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for processing of grievances." 406 U.S. at 323-24.

Andrews also stands for the proposition that RLA preemption applies even if the relief available from the adjustment board does not match state law actions or remedies. Justice Douglas, dissenting in *Andrews*, discussed the remedies available to the discharged employee under Georgia law and cited the rationale of *Moore* and its progeny: " '*A common law or statutory cause of action for wrongful discharge differs from any remedy which the Board has the power to provide.*' " 406 U.S. at 329 (Douglas, J., dissenting) (quoting *Slocum*, 339 U.S. at 244) (emphasis in dissenting opinion). Justice Douglas argued that referring the employee's claims to the RLA "is to remit him to an agency that has no power to act on this claim." *Andrews*, 406 U.S. at 328. The dissent also complained that "an employee seeking damages for reinstatement is normally entitled to a jury trial; and no division of the Adjustment Board ever pretends to serve in that role." *Id.* at 329.[19]

The *Andrews* majority did not respond point by point to the dissenting Justice's argument, but it was forthright in acknowledging that RLA preemption could preclude resort to remedies otherwise available in a state court:

> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee

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[19] Justice Douglas also observed: "[T]he body of law governing the discharge of employees who do not want or seek reinstatement is not found in customs of the shop or in the collective agreement but in the law of the place where the employee works. The Adjustment Board is not competent to apply that law." 406 U.S. at 329.

The objections raised by Justice Douglas in *Andrews* were similar to those raised in dissent by Justice Reed in *Slocum*, 339 U.S. at 245, a case holding that employees could not resort to state court to enforce the terms of their collective bargaining agreements. Justice Reed complained that "the Court says that Congress has forced the parties into a forum that has few of the attributes of a court, but which may be the final judge of the rights of individuals." 339 U.S. at 252-53.

> and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another.

406 U.S. at 325.

In sum, *Andrews* holds that the RLA dispute mechanism procedures are mandatory and exclusive for all disputes within the RLA's scope, even if that means that state law rights and remedies will be lost. From the statutory language and legislative history of the RLA, it is clear that RLA jurisdiction extends to disputes involving non-contractual challenges to discipline and discharge. *Burley* confirms that RLA jurisdiction extends to disputes over discipline and discharge "where the grievance arises from incidents of the employment not covered by a collective agreement," and that "the statute does not purport to distinguish" between such "omitted cases" and those claims involving specific contract provisions. *Burley*, 325 U.S. at 736. In view of the clear reach of the RLA to non-contractual discipline and discharge disputes, the holding in *Andrews*, when read with the holding in *Burley*, means that all state law wrongful discharge claims are preempted whether they are pled as breaches of state contract laws or violations of state tort laws.[20]

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[20] Of course, the preempted claim in *Andrews* was founded upon a breach of a collective bargaining agreement. *See Andrews*, 406 U.S. at 324 ("the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective bargaining agreement. . . . "). However, the decision does not purport to limit the scope of RLA preemption to contract-based claims. Indeed, the employee in *Andrews* could have easily pled his "wrongful discharge" claim as a tort or statutory disability discrimination claim because "the company refused to allow him to go to work on the ground he had not recovered sufficiently [from an injury] to perform his former duties." 406 U.S. at 327 (Douglas, J., dissenting). *See generally*, *Melanson v. United Air Lines, Inc.*, 931 F.2d 558, 561 n.1 (9th Cir. 1991) ("Nearly any contract claim can be restated as a tort claim. The RLA's grievance procedure would become obsolete if it could be circumscribed by artful pleadings").

II. THE RLA PREEMPTS NORRIS' "WRONGFUL DISCHARGE" CLAIMS

Norris' "wrongful discharge" tort claims in Count I against Hawaiian and Counts I and II against the Individual Defendants are preempted by the RLA because those claims "grow[] out of grievances, or out of the interpretation or application of [an] agreement concerning rates of pay, rules, or working conditions. . . . " RLA Section 204, 45 U.S.C § 184. In Count I of each complaint Norris states a common law tort claim that he was wrongfully discharged in violation of public policies embodied in the Federal Aviation laws because he refused to sign off on a work report due to his concerns about the airworthiness of an axle sleeve he observed during a tire change on a DC-9 aircraft (Jt. App. 7).[21] Similarly, in Count II of his complaint against the Individual Defendants, Norris states a common law tort claim that he was wrongfully discharged in violation of public policies within the state whistleblower act because he reported an unsafe axle sleeve to the Federal Aviation Authority (Jt. App. 17).

Norris' common law claims are exactly the kinds of disputes Congress directed both employees and carriers, as well as carriers' officers, to resolve through the dispute resolution procedures of the RLA. *See* RLA Section 2 First, 45

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[21] It should be noted that Congress itself has never expressly included a "whistleblower" protection provision in the Federal Aviation Act despite bills being introduced to enact such legislation. *See* S. 48, 101st Cong., 1st Sess. (1989); H.R. 4023, 100th Cong., 2d Sess. (1988); H.R. 4113, 100th Cong., 2d Sess. (1988); H.R. 5073, 100th Cong., 2d Sess. (1988). While the reasons the legislation has failed cannot be determined, it is certainly possible that Congress was aware that employees in the airline industry are already protected from termination for whistleblowing under the mandatory arbitration procedures of Section 204 of the RLA. *See* discussion of FRSA *supra* pp. 12-14.

U.S.C. § 152 First ("carriers, their officers, agents, and employees" have a duty "to settle all disputes, whether arising out of the application of [collective bargaining] agreements or otherwise. . . . "). Those claims are covered by the explicit description of the jurisdiction of the System Board of Adjustment in RLA Section 204, 45 U.S.C. § 184. Furthermore, such whistleblower or public policy claims have long been recognized by Congress to be amenable to resolution through adjustment board procedures. *See* discussion of NLRA and FRSA *supra* pp. 12-14. The legislative history of the RLA likewise demonstrates, as this Court held in *Andrews*, that the adjustment board forum is mandatory for wrongful discharge claims within the RLA's jurisdiction. Finally, *Burley* makes it plain that employee claims based on substantive law external to a collective bargaining agreement are within adjustment board jurisdiction, at least where the particular claim has been identified by Congress – as discipline and discharge claims repeatedly were – as a dispute to be resolved through the RLA. Norris' claims therefore fall squarely within the RLA dispute resolution scheme and must be preempted.

To the extent that any ambiguity might exist as to whether Norris' claims are committed exclusively to adjustment board jurisdiction, that ambiguity has been removed by the terms of the CBA covering Norris' employment. Under Article XVI of that agreement, a System Board of Adjustment is established "[i]n compliance with Section 204, Title II, of the Railway Labor Act" (Pet. App. 54a) and is given, in Article XVI.C, "exclusive jurisdiction over disputes between any employee covered by this Agreement and the Company . . . growing out of grievances concerning disciplinary action, rules, rates of pay, or working conditions covered by this Agreement . . . or out of the interpretation or application of any terms of this Agreement. . . . " (Pet. App. 55a). Since the foregoing contractual language tracks the adjustment board jurisdictional language of RLA Section 204, it is clear that Norris' non-contract-based wrongful discharge claims are within the adjustment board's jurisdiction. *See* discussion *supra* Part I. Indeed, by including grievances "concerning disciplinary action" within the "exclusive jurisdiction" of the

adjustment board, Article XVI.C is, if anything, clearer than RLA Section 204 in encompassing Norris' claims.

Furthermore, the CBA requires the adjustment board to evaluate whether the discipline of an employee in Norris' situation would violate public policies embodied in the Federal Aviation laws. Article XVII.F of the CBA provides that "[a]n employee's refusal to perform work which is in violation of established health and safety rules, or any local, state or federal safety law shall not warrant disciplinary action" (Pet. App. 60a-61a).[22] The CBA therefore makes explicit in Articles XVI.C and XVII.F what we have previously shown Congress understood to be encompassed by the mandatory jurisdiction of adjustment boards – namely, resolution of disciplinary "grievances," including whistleblower claims such as Norris', even when those claims are non-contract based.

Mandatory adjustment board jurisdiction is independently established by the fact that Norris' claims "grow out of . . . the interpretation or application of . . . terms of [the CBA]" (CBA Article XVI.C, Pet. App. 55a). *See also* RLA

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[22] While the Hawaii court conducted its own analysis of Article XVII.F and found that that provision did not protect a mechanic who refused to sign off on work records or who refused to perform work out of safety concerns regarding the airworthiness of an aircraft (Pet. App. 19a-20a), a System Board with knowledge of the industry practices and working conditions might well disagree with the court's narrow construction, thereby affording additional substantive protections to covered employees and, by extension, to the flying public. Indeed, an arbitrator with 32 years of experience interpreting collective bargaining agreements in many industries, including 25 years in the airline industry (*see* Jt. App. 317, 325-26), reviewed the protection given to employees by Article XVII.F and testified without contradiction that "this agreement, in an unusual fashion, does cover the so-called whistleblower incident . . . exception to insubordination, very specifically in the contract." (Jt. App. 316 (Testimony of Ted Tsukiyama, Esq.); *see also* Jt. App. 307-08, 313 ("this contract is unusual in that it does have provisions which, I think, protect an employee in Mr. Norris' position with regard to refusing to sign off or complaining about what he believes to be unsafe work . . . or unsafe practices."), and Jt. App. 314-18).

Section 204, 45 U.S.C. § 184. When the dispute arose between Norris and his supervisor about his refusal to sign the work record for the tire change, the two disagreed about whether the signature on the work record meant that Norris was signing for the condition of the axle sleeve. Since the CBA provides that "[a]n airline mechanic may be required to sign work records in connection with the work he performs," Norris' discipline for refusing to sign the work record clearly "grew out of" an application of the CBA. (CBA, Article IV.D.4(a), Pet. App. 48a). See discussion *infra* pp. 44-45.

Finally, an essential element of Norris' claims is a "discharge," and proving that will require interpretation *and* application of the CBA *and* of the grievance process itself. In Norris' case, the hearing officer at the step 1 level recommended Norris' termination, but while the grievance was pending at the step 3 level, the step 3 hearing officer reduced the discipline to a suspension. Norris never returned to work or attempted to have his suspension overturned. Instead, several months after his reinstatement, he filed suit in state court claiming he had been discharged.

The nature and classification of the disciplinary action taken against Norris is a matter within the expertise of the adjustment board, and it is a matter requiring uniformity of treatment throughout the airline and railroad industries. Certainly that is one reason why Congress committed resolution of such disputes to the RLA arbitral process. *Cf. Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986) (worker who won reinstatement through the RLA grievance proceeding cannot subsequently sue for "wrongful discharge" under state law), *cert. denied*, 488 U.S. 925 (1988).[23]

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[23] Despite this fundamental purpose of the RLA, the Hawaii Supreme Court completely ignored Hawaiian Airlines' argument that the RLA precluded a state court from deciding the nature of Norris' discipline since that determination is part and parcel of the grievance process. If allowed to stand, the court's decision will require a state court jury to interpret the CBA and its application and the CBA's grievance procedure to determine if

The mandatory jurisdiction of the System Board over Norris' claims under the agreement here is also supported by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991). *Gilmer* held that the terms of an arbitration agreement covered by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, could require arbitration of a discriminatory discharge claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621 *et seq.*, where the arbitration agreement was covered by the FAA and the language of the agreement was broad enough to encompass the ADEA claim. 500 U.S. at ___, 114 L. Ed. 2d at 35. The issue before the Court here – namely, the scope of RLA preemption of state law wrongful discharge claims – is different than the issue in *Gilmer*, which addressed whether arbitration can be a mandatory forum for federal discrimination claims. However, the holding in *Gilmer* that an arbitration agreement that is sanctioned by federal law, and sufficiently broad in its description of arbitral jurisdiction, can form the basis for mandatory arbitration of a non-contract-based discharge claim supports our view that the RLA-sanctioned CBA here by the broad jurisdiction terms of Article XVI.C properly granted "exclusive jurisdiction" to the adjustment board to consider Norris' state-law wrongful discharge claims.

Finally, preemption of Norris' claims by the RLA is supported by the fact that the subject matter of the claims – discipline related to safety matters and even whistleblowing – are frequently resolved by arbitration. *See, e.g., Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986) (discharge of flight attendant who complained of violation of flight and duty time rules presents a minor dispute for the RLA); *Missouri-Kansas*

Norris was discharged; for Norris cannot prevail in his wrongful discharge claims if he was merely suspended.

Texas R. v. Brotherhood of R.R. Trainmen, 342 F.2d 298, 300 (5th Cir. 1965) (prior to enactment of FRSA rail employees were required to submit whistleblower grievances to National Railway Adjustment Board for adjustment).[24]

III. THE CASES RELIED ON BY NORRIS, THE HAWAII SUPREME COURT AND THE SOLICITOR GENERAL TO NARROW THE SCOPE OF RLA PREEMPTION DO NOT DETERMINE THE SCOPE OF ADJUSTMENT BOARD JURISDICTION

Instead of applying the directive of this Court's rulings in the *Andrews* and *Burley* decisions, Norris, the Hawaii Supreme Court and the Solicitor General of the United States urge that four other decisions by this Court – *Lingle*, *Conrail*, *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) – require the result reached by the Hawaii Supreme Court. As set forth below, the cases relied upon are clearly distinguishable both legally and factually from the *Norris* case. To apply them to the RLA preemption issue here would be wholly inconsistent with the language, history, and purposes of the RLA. None of those cases provide a basis for departing from Congress' clear intent that disputes involving discipline and discharge – even those involving matters outside of a collective bargaining

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[24] Numerous reported decisions of the NRAB similarly address wrongful discharge and whistleblower issues. NRAB Third Division Award No. 23151 (Jan. 30, 1981) at 1, 7 (addressing grievance that employee had been dismissed in retaliation for "disloyalty" to the railroad); NRAB Third Division Award No. 27505 (Sept. 22, 1988) (addressing claim of "constructive discharge" arising from employee's refusal to follow criminal directives); NRAB First Division Award No. 24059 (Feb. 6, 1991) at 1-2 (employee allegedly discharged for complaining of safety procedures); NRAB Second Division Award No. 12148 (Sept. 25, 1991) at 2 (claimed discharge of employee for public statements regarding safety matters); Public Law Board No. 3399, Award No. 4 (Mar. 11, 1985) at 6 (awarding damages for termination held retaliatory).

agreement and specifically those involving whistleblower claims – should be conclusively resolved by adjustment boards.

A. THE HAWAII COURT'S RELIANCE ON *LINGLE* IS MISPLACED

1. Lower Courts Broadly Applied *Andrews* to Tort-Based Claims for "Wrongful Discharge" Until This Court's Decision in *Lingle*.

As discussed above, this Court held in *Andrews* that the RLA preempts an employee's state law wrongful discharge claim. Prior to the *Lingle* decision, courts broadly applied *Andrews* to hold that the RLA preempts claims for wrongful discharge that sound in tort as well as contract. In fact, with one exception, every pre-*Lingle* court considering the preemptive effect of the RLA over state law wrongful discharge claims ruled in favor of preemption. *See Mayon v. Southern Pac. Transp. Co.*, 805 F.2d 1250, 1252 (5th Cir. 1986), *cert. denied*, 488 U.S. 925 (1988); *Minehart v. Louisville & N. R.R.*, 731 F.2d 342, 345 (6th Cir. 1984); *Graf v. Elgin, J. & E. Ry.*, 790 F.2d 1341, 1348 (7th Cir. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1048-51 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir. 1985); *Campbell v. Pan American World Airways, Inc.*, 668 F. Supp 139, 145 (E.D.N.Y. 1987) (broader preemption under RLA than under NLRA); *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2nd Cir. 1987) ("stronger application of the preemption doctrine is a corollary to the RLA's unique dispute-resolution framework"); *Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414, 417 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984). *But see Puchert v. Agsalud*, 67 Haw. 25, 29, 677 P.2d 449, 456 (1984), *appeal dismissed for want of substantial federal question*, 472 U.S. 1001 (1985).

Pre-*Lingle* courts also uniformly found other kinds of torts arising out of or related to wrongful discharge claims to be preempted. *McCall v. Chesapeake & O. Ry.*, 844 F.2d 294,

303 (6th Cir.) (RLA preempts discrimination claim by diabetic who was terminated), *cert. denied*, 488 U.S. 879 (1988); *Magnuson v. Burlington N. Inc.*, 576 F.2d 1367, 1369 (9th Cir.) (RLA preempts claim of emotional distress following alleged wrongful discharge), *cert. denied*, 439 U.S. 930 (1978); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (RLA preempts claim of intentional infliction of emotional distress resulting from harassment relating to work conditions and disciplinary procedures); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 192 (9th Cir. 1983) (RLA preempts wrongful demotion claim).

The foregoing pattern of holdings was disrupted in the wake of this Court's ruling in *Lingle v. Norge Div. of Magic Chef, Inc.* ("*Lingle*"), 486 U.S. 399 (1988), in which this Court fashioned a standard to address preemption under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In the years following the *Lingle* decision, a minority of lower courts has applied the *Lingle* preemption standard to RLA cases.[25]

In the majority of cases, however, courts have recognized that critical differences between the LMRA and the RLA make the *Lingle* standard inapplicable in the RLA context. *See Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1097 (9th Cir. 1991) (cases under the LMRA not controlling because preemption under RLA is broader than under § 301); *Lorenz v. CSX Trans., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (*Lingle* inapplicable because RLA preemption is more pervasive);

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[25] *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993); *Davies v. American Airlines, Inc.*, 971 F.2d 463, 466-67 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); *International Ass'n of Machinists & Aerospace Workers v. Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y. Sup. Ct. 1989); *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 593 A.2d 750, 758 (1991); *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992) (applying *Lingle* but finding preemption), *cert. denied*, 122 L. Ed. 2d 134 (1993).

Smolarek v. Chrysler Corp., 879 F.2d 1326, 1334 n.4 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989); *Brown v. Missouri Pac. R.R.*, 720 S.W.2d 357, 359 n.5 (Mo.), *cert. denied*, 481 U.S. 1049 (1986) (NLRA is much less impacting than RLA); *Feldleit v. Long Is. R.R.*, 723 F. Supp. 892, 899 (E.D.N.Y. 1989) ("[t]here is broader preemption under the RLA than under other federal labor laws"); *Underwood v. Venango River Corp.*, 995 F.2d 677, 682 (7th Cir. 1993) (*Lingle* and *Andrews* support the position that RLA preemption is broader than preemption under the LMRA); *Croston v. Burlington N.R.R.*, 999 F.2d 381 (9th Cir. 1993).

Indeed, many post-*Lingle* decisions recognize the broad preemptive power of the RLA without even referring to *Lingle*. *See, Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 845 (9th Cir. 1989) (post-*Lingle* decision holding wrongful discharge claims preempted by RLA); *Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989); *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992). In *Norris*, the Hawaii court joined the minority of courts and applied the less-preemptive *Lingle* standard to RLA preemption. As explained below, the *Lingle* standard is inapplicable to preemption under the RLA.

2. *Lingle* is Inapplicable to Preemption Under the RLA.

The *Lingle* test is inapplicable here because it addresses preemption under the LMRA, a statute significantly different from the RLA in its language, history, and purposes. The plaintiff in *Lingle* had been discharged by her employer on grounds that she had filed a false workers' compensation claim. 486 U.S. at 401. Pursuant to the arbitration provision of a collective bargaining agreement, the union filed a grievance on the employee's behalf. *Id.* at 401. Subsequent to the filing of the grievance, the employee also filed a state court action against her employer alleging wrongful discharge. *Id.* at 402. The issue in *Lingle* was whether the plaintiff's state law action was preempted by Section 301 of the LMRA,

which provides only that suits for breach of collective bargaining agreements may be brought in federal court. *See* 29 U.S.C. § 185. This Court ruled that Section 301 preempts a state law action only if "resolution of [that claim] depends upon the meaning of a collective-bargaining agreement. . . . " 486 U.S. at 405-06.

The *Lingle* preemption holding was carefully limited to the Congressional intent underlying Section 301. Indeed, the opinion clearly cautioned that it would be inappropriate to extend the *Lingle* test into other areas of preemption under other federal labor laws. 486 U.S. at 409 n.8 ("it is important to remember that other federal labor law principles may preempt state law"). A comparison of the statutory language, legislative history, and Congressional purposes of the RLA with the language, history, and purposes of Section 301 establishes that the *Lingle* preemption standard is inappropriate for determining RLA preemption.

Section 301 does not compel or mandate arbitration of workplace disputes. Neither the text nor the legislative history of Section 301 even mentions arbitration. Instead, arbitration under the LMRA is a matter of contractual undertaking between the parties and is purely voluntary. Thus, this Court recently held that under Section 301 an employee could file suit directly in federal court where the parties' collective bargaining agreement did not specifically commit resolution of a dispute to arbitration. *See Groves v. Ring Screw Works*, 498 U.S. 168 (1990).

The silence of the LMRA concerning arbitration differs markedly from the RLA, which mandates arbitration through adjustment boards. 45 U.S.C. §§ 153 First (i), 184. Moreover, while the LMRA does not purport to dictate the types of disputes to be submitted to arbitration under bargaining agreements, the RLA provides that certain types of claims must be resolved by an adjustment board regardless of whether the parties agree to do so. *Id.* Finally, the RLA by its terms and its legislative history commits non-contractual disputes concerning discharge and discipline to the adjustment

board process, while Section 301 is limited to contract disputes. *See* Part I *supra*.

Perhaps the best proof of the inapplicability of the *Lingle* standard to RLA preemption lies in the plain language of RLA Sections 3 First (i) and 204, 45 U.S.C. §§ 153 First (i) and 184, which detail adjustment board jurisdiction. Those provisions require arbitration of all disputes growing out of grievances or out of contract application in addition to all disputes growing out of contract interpretation. Since the *Lingle* test focuses solely on contract interpretation, it cannot be applied to RLA preemption because to do so would fail to protect the statutorily explicit adjustment board jurisdiction over disputes growing out of grievances or out of contract application.

In addition, Section 301 and the RLA have markedly different purposes which cannot be satisfied by applying the same preemption test. In enacting Section 301, Congress was seeking to assure uniformity in the interpretation of collective bargaining agreements. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962). Given that objective, it makes sense that the preemption test under 301 should focus on the narrow issue of whether a state claim will require interpretation of a collective bargaining agreement.

Congress expressed a much broader purpose in enacting the RLA. As discussed in Part I, *supra*, Congress sought to assure uniform, expeditious, and final resolution of disputes by boards composed of knowledgeable individuals dealing with complex, technical issues in the transportation industry. Congress wanted to keep employment disputes in the transportation industry out of the courts. Indeed, Congress has for almost seventy years maintained its vision of industry adjustment boards resolving a broad range of contractual and non-contractual claims as the best way to meet the many competing interests of employers and employees in rail and airline industries.

Finally, the *Lingle* standard – by allowing individual employees significant access to state courts – serves the

purpose in the LMRA setting of protecting individual employee non-contract rights. By contrast, Congress in the RLA – as this Court held in *Burley* – carefully assured that an individual employee's non-contract claims would be considered in the adjustment board forum. In the LMRA setting, an employee has no right to participate in or even require arbitration of his or her individual claim: that right rests exclusively with the employee's bargaining representative, subject to the duty of fair representation. *See supra* note 12. Therefore preemption of an employee's non-contract "wrongful discharge" claim under the LMRA scheme could mean that the employee would have no forum at all to have the claim resolved.

Under the RLA the employee is guaranteed a forum for resolution of a "wrongful discharge" claim because (1) Congress has required carriers to establish adjustment boards; (2) Congress has required those adjustment boards to resolve disputes "growing out of grievances," including non-contract claims (*see* discussion in Part I, *supra*); and (3) Congress has guaranteed individual employees the right to pursue those claims for themselves, with their own counsel, before the adjustment board (*see* discussion of *Burley supra* pp. 23-27).

Unlike the collective bargaining setting of the LMRA, a union and an employer covered by the RLA cannot lawfully reach an agreement extinguishing the individual employee's access to the adjustment board for resolution of individual claims, and therefore employees with such claims will always have a forum in the adjustment board. *See generally*, *Burley*, 325 U.S. at 740 n.39; *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 336 (3rd Cir. 1993) (probationary employee could not be denied access to adjustment board for resolution of his individual "wrongful discharge" claim even though the collective bargaining agreement provided that it was inapplicable to probationary employees); *Slagley v. Illinois Cent. R.R.*, 397 F.2d 546, 551 (7th Cir. 1968) (employee's right to have claim resolved by adjustment board is "statutory and

cannot be nullified by agreement between the carrier and the union").

Any attempt by the adjustment board, the employer or the union to deny the individual employee access to the adjustment board could be met with a judicial order compelling arbitration. *See Capraro*, 993 F.2d at 337. Furthermore, a failure of an adjustment board to consider an employee's non-contract based claim involving significant public policies could be a basis for overturning the adjustment board's decision. See *Paperworkers v. Misco*, 484 U.S. 29, 43 (1987) (arbitral decision contrary to public policy may be set aside). That would certainly be the case if an adjustment board were to refuse to consider Norris' claims here, for the CBA itself in Article XVII.F mandates consideration of the public policies underlying federal and state safety laws. *See* discussion *supra* p. 33. Since individual employees – and Norris, in particular – are guaranteed the right under the RLA to have their non-contract "wrongful discharge" claims considered by an adjustment board, RLA preemption is properly much broader than LMRA preemption.

3. Norris' "Wrongful Discharge" Claims are Preempted by the RLA Even if the *Lingle* Standard is Used.

As discussed above, the *Lingle* standard is inappropriate for RLA preemption given the clear and obvious differences between the two legislative schemes. However, even if *Lingle* does apply, Norris' wrongful discharge claims are still preempted because they require interpretation of the CBA.

The CBA would have to be interpreted to determine whether Norris was in fact discharged, since "discharge" is an essential element of a wrongful discharge claim. Here, it was only at step 1 of the grievance procedure that a hearing officer recommended that Norris be terminated (Pet. App. 63a). Later, a step 3 hearing officer reduced the discipline to a suspension (Pet. App. 66a). According to the deposition testimony of arbitrator Ted T. Tsukiyama, the discipline that had

been meted out to Norris at the time Norris filed suit was a suspension under the provisions of the CBA (Jt. App. 306). Thus, in order to determine if Norris was discharged, it will be necessary to construe the CBA and its application and interpretation, as well as the CBA's grievance procedure.

Lingle also holds that there is preemption where interpretation of the bargaining agreement is required to resolve a defense presented in the case. 486 U.S. at 407.[26] The trier of fact in Norris' case will no doubt be called upon to interpret the CBA in evaluating Petitioners' defense to his wrongful discharge claims. Petitioners' basis for disciplining Norris was his refusal to sign off on a work record for work he claimed involved an unsafe aircraft part (Jt. App. 213). Article IV of the CBA specifically provides that an aircraft mechanic "may be required to sign work records in connection with the work he performs" (Pet. App. 49a). That provision of the CBA would have to be interpreted in order to

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[26] The Solicitor General proposes a test for preemption that would ignore all but the affirmative proof offered by a plaintiff in determining whether the collective bargaining agreement is at issue. Brief of the United States as Amicus Curiae ("Br.") 11-12. This is not what *Lingle* suggests, and it is not workable or logical within the framework in which matters of fact are established at trial or hearing. The claim of improper motive cannot, as the Solicitor General suggests, be decided in a vacuum. Proof of improper motive will require evidence to disprove that the declared "proper" motive was in fact the basis for the discharge decision. *Cf. St. Mary's Honor Ctr. v. Hicks*, 125 L. Ed.2d 407 (1993) (defendant in Title VII suit has the burden of producing evidence of non-discriminatory motive once a prima facie case of discrimination is shown, but plaintiff's ultimate burden of persuasion includes the burden of disproving that proffered motive applies) (relying upon *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981)). Certainly, evidence of contractual provisions and the historical application of those provisions by the parties as to grounds for discharge and discipline will be considered in resolving the motive question. As the Court in *Lingle* recognized, construction of a bargaining agreement may be just as much at issue in the refutation of a claim as in its prosecution.

resolve Norris' wrongful discharge claims because the provision would justify Hawaiian Airlines' discipline of Norris if the work record he was asked to sign did not cover the allegedly defective axle sleeve.[27]

Finally, the Hawaii court has already demonstrated in its decision that *Lingle* preemption should apply because the court conducted its own analysis of one substantive and one remedial provision of the CBA and limited the breadth of those provisions without the benefit of an adjustment board determination. In particular, the court limited the scope of Article XVII.F, which protects employees from discipline for refusal to work in violation of state or federal safety laws (*see* discussion *supra* p. 33 & n.22), and the court also found that no punitive damages were available to employees under the CBA (*see supra* note 5) (Pet. App. 19a-20a, 24a). By independently interpreting and sharply curtailing the rights and remedies available to employees under the CBA, the Hawaii state court has already done what the *Lingle* standard was designed to prevent – interpret the collective bargaining agreement.

In sum, since essential elements of Norris' claims and the Defendants' defense will require interpretation of the CBA, Norris' wrongful discharge claims would be preempted even if the narrower *Lingle* standard were to be applied.

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[27] Norris' supervisor, Justin Culahara, has testified during deposition that he told Norris, at the time he asked him to sign the work record, that he was not asking him to sign for the condition of the axle sleeve because Culahara himself and inspector Henry Wong had already signed a separate work record regarding the axle sleeve. Culahara instead asked Norris to sign off for the tire change, in which Norris had participated (Jt. App. 82). Culahara's supervisor has also testified that Norris was free to place a note on the work record he was asked to sign indicating that he, Norris, considered the axle sleeve to be unairworthy (Jt. App. 80).

B. *ALEXANDER V. GARDNER-DENVER* DOES NOT WEIGH AGAINST SYSTEM BOARD RESOLUTION OF CLAIMS

The Solicitor General cites (Br. 13 n.10) *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), for the proposition that arbitrators exceed their authority when they rely upon sources of law outside of the collective bargaining agreement. That is an erroneous reading of the decision. The *Alexander* case held that an employee's submission of a discharge claim to arbitration under a nondiscrimination clause of a collective bargaining agreement did not preclude him from bringing a Title VII action in federal court. *Id.* at 59-60. The decision lends no support whatsoever to the idea that arbitrators may not determine matters of external law.[28] Indeed, this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26 (1991), conclusively demonstrates that statutory claims such as those under Title VII may be submitted to binding arbitration.

To the extent that the *Alexander* Court was concerned with an individual employee's ability to have his or her claim fairly processed by a union through arbitration, that concern is not present where there is an RLA adjustment board. As previously discussed, the RLA allows employees to proceed independently, with counsel of their choice, through the adjustment board process. 45 U.S.C. § 153 First (i) and (j). An employee covered under the RLA possesses substantive individual rights, and the union may not settle a claim that those rights have been violated without the employee's active participation and approval. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 740, n.39 (1945).

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[28] In addition, the *Alexander* decision has no bearing on preemption analysis here because it involved the accommodation of federal laws, an issue far removed from the preemption doctrine, which concerns the primacy of federal laws over competing or related state laws. *See also Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 566-67 (1987).

Moreover, even if there were opportunities for conflicts within the bargaining unit in RLA cases, these conflicts should not be presumed to exist in the absence of some showing that the union would be less than vigilant in pursuing an employee's external law claims in arbitration. The facts of the present case show vigorous pursuit, and success, by the union in dealing with Norris' claims prior to Norris dropping out of the adjustment board process (Pet. App. 63a-66a). In sum, the Solicitor General's reliance on the *Alexander* decision is misplaced.

C. *COLORADO ANTI-DISCRIMINATION COMMISSION* IS INAPPOSITE

This Court's decision in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), relied upon by the Solicitor General (Br. 12-13), is likewise inapposite to this case. In *Colorado Anti-Discrimination Commission*, this Court held that the RLA did not preempt a claim under a state law prohibiting racial discrimination in hiring. Since the plaintiff there had not been hired by the company, there was no way for him to process a grievance under the RLA dispute resolution procedures. See 45 USC §§ 151 Fifth and 181 (defining "employee" for purposes of the RLA) and 45 U.S.C. §§ 153 First (i), 184 (limiting adjustment board jurisdiction to disputes involving one or more "employees"). *See also, Nelson v. Piedmont*, 750 F.2d 1234, 1237 (4th Cir.) (applicant is not an "employee" under the RLA), *cert. denied*, 471 U.S. 1116 (1985). Therefore, since the plaintiff in *Colorado Anti-Discrimination Commission* could not have turned to an RLA adjustment board for resolution of his dispute, the Court properly found that his claim was not preempted.

Moreover, the arguments raised by the Solicitor General regarding the *Colorado Anti-Discrimination Commission* case are spurious. First, the Solicitor General's concern that RLA preemption would "substantially displace state regulation" (Br. 13) is ill-founded. Displacement of state law lies at the

very heart of the preemption doctrine. Since displacement of state law is the intended result of broad federal legislation, it is hardly grounds for objection in a preemption case. In any event, employees' non-contract-based state claims are given consideration under the RLA adjustment board scheme. *See* discussion *supra* Part I.

The Solicitor General's fear (Br. 13) that arbitrators will be required to adjudicate issues of state tort law is equally unwarranted. As the Solicitor General concedes, this Court has already held in *Gilmer* that arbitrators may adjudicate statutory claims. The Solicitor General attempts to distinguish *Gilmer* by emphasizing that *Gilmer* involved an individual employment contract as opposed to a collective bargaining agreement, and therefore there was no "tension between collective representation and individual statutory rights." Solicitor General's Br. at 13, n.10, citing *Gilmer*, 111 S. Ct. 1547, 1657 (1991). The Solicitor General's argument is erroneous because under the RLA employees are free to pursue their claims independently. Therefore, an RLA claimant is as free from the tensions of collective representation as the plaintiff in *Gilmer*.

D. *CONRAIL*'S MINOR DISPUTE TEST IS NOT APPROPRIATE FOR DETERMINING THE SCOPE OF RLA PREEMPTION, AND IS SATISFIED IN ANY EVENT.

The Solicitor General urges (Br. 8-11) that the standard for recognizing a "minor" dispute articulated in *Conrail*, 491 U.S. 299 (1989), should be used as the test to determine whether a given state law dispute is preempted. There is no valid reason for extending *Conrail* into the preemption area. The issue in *Conrail* was whether a particular dispute – indisputably within RLA jurisdiction – was "major" and thus required the maintenance of the status quo pending bargaining procedures, or "minor" and hence referable to arbitration. 491 U.S. at 307. There was no issue of RLA preemption because

there was no question whether the dispute would be resolved through RLA procedures.

The language and logic of *Conrail* make clear that it was not intended by this Court to address the question of preemption of state law claims arising from airline or railroad employment disputes. If this Court had intended to hold that only those disputes arguably governed by a bargaining agreement are cognizable by RLA adjustment boards, it no doubt would have analyzed the statutory language which by its terms extends adjustment board jurisdiction to non-contractual claims. The Court also would have explained why its holding in *Burley* recognizing the "omitted case" had been overruled. Instead, the *Conrail* Court is silent about the reach of the plain language of the RLA and actually quotes *Burley* – including the "omitted case" discussion – with approval. *See Conrail*, 491 U.S. at 303. The *Conrail* Court's failure to address these matters suggests it had no intention of providing a standard for RLA preemption of state law claims.

Moreover, even if *Conrail* does provide the standard for determining when state law claims are preempted by the RLA, that standard is satisfied here. The terms of the CBA could "conclusively resolve" (*Conrail*, 491 U.S. at 305) Norris' claims. For example, as the Solicitor General admits (Br. 10-11, 14), Norris will have to show that he was in fact discharged. There is certainly a question on the record whether Norris was terminated, since the employer mitigated his punishment to a suspension during the grievance proceedings before Norris filed suit. Similarly, there is a legitimate question whether Norris' discipline was "arguably justified" (*Conrail*, 491 U.S. at 307) by the CBA as "for cause" (CBA Art. IX.I.5, Pet. App. 50a). Finally, since the CBA by its express terms permits the company to require an employee to sign off on work records (CBA, Art. IV.D.4(a), Pet. App. 49a), and conversely provides that an employee may not be disciplined for refusing to perform work in violation of federal or state health and safety laws (CBA, Art. XVII.F, Pet. App. 60a-61a), Norris' claims certainly would have been

conclusively resolved by the adjustment board if Norris had not abandoned the CBA's grievance process. See discussion *supra* pp. 43-45.

CONCLUSION

For the reasons set forth herein, Petitioners urge that the Hawaii Supreme Court's decision should be reversed and remanded with instructions to reinstate the circuit court's rulings dismissing Count I of Norris' complaint against Hawaiian Airlines and Counts I and II against the Individual Defendants on preemption grounds.

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